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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 10, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSICA G.,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of the Social Security
Administration,¹

Defendant.

No: 1:21-CV-03014-LRS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 18, 23. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney D. James Tree. Defendant is represented by Special Assistant United States Attorney Erin F. Highland. The

¹Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Court, having reviewed the administrative record and the parties' briefing, is fully
2 informed. For the reasons discussed below, the Court **GRANTS** Plaintiff's Motion
3 for Summary Judgment, ECF No. 18, **DENIES** Defendant's Motion for Summary
4 Judgment, ECF No. 23, and **REMANDS** the case for to the Commissioner for an
5 immediate award of benefits.

6 **JURISDICTION**

7 Plaintiff Jessica G.² filed applications for Disability Insurance Benefits
8 (DIB) and Supplemental Security Income (SSI) on May 6, 2015, Tr. 139-40,
9 alleging disability since February 18, 2015, Tr. 307, 314, due to fibromyalgia,
10 irritable bowel syndrome, stomach problems, an undefined back problem,
11 migraines, her feet and hands going numb, and an inability to sleep, Tr. 333.
12 Benefits were denied initially, Tr. 185-97, and upon reconsideration, Tr. 194-203.
13 A hearing before Administrative Law Judge Laura Valente ("ALJ") was conducted
14 on April 3, 2018. Tr. 63-93. Plaintiff was represented by counsel and testified at
15 the hearing. *Id.* The ALJ also took the testimony of vocational expert Sharon F.
16 Welter. *Id.* The ALJ denied benefits on May 7, 2018. Tr. 15-26. The Appeals
17 Council denied Plaintiff's request for review on March 21, 2019. Tr. 1-6. The
18

19 ²In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's
20 first name and last initial, and, subsequently, Plaintiff's first name only, throughout
21 this decision.

1 matter was appealed to this Court on May 13, 2019. Tr. 860. This Court
2 remanded the case for additional proceedings on December 2, 2019. Tr. 866-94.

3 A second hearing was held on September 30, 2020 before ALJ M.J. Adams.
4 Tr. 790-821. The ALJ took the testimony of Plaintiff and vocational expert,
5 Steven Floyd. *Id.* The ALJ entered an unfavorable decision on October 26, 2020.
6 Tr. 770-82. The Appeals Council did not assume jurisdiction in the case under 20
7 C.F.R. §§ 404.984(a), 416.1484(a); therefore, the ALJ's decision became the final
8 decision of the Commissioner. This case is now before this Court pursuant to 42
9 U.S.C. §§ 405(g); 1383(c)(3). ECF No. 1.

10 **BACKGROUND**

11 The facts of the case are set forth in the administrative hearing and
12 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.
13 Only the most pertinent facts are summarized here.

14 Plaintiff was 25 years old at the alleged onset date. Tr. 307. She completed
15 one year of college in 2007. Tr. 334. Plaintiff's reported work history includes the
16 jobs of convenience store clerk and childcare provider. Tr. 334. At application,
17 she stated that she stopped working on September 1, 2014, due to her conditions.
18 Tr. 333, 342.

19 **STANDARD OF REVIEW**

20 A district court's review of a final decision of the Commissioner of Social
21 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is

1 limited; the Commissioner's decision will be disturbed "only if it is not supported
2 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
3 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
4 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
5 (quotation and citation omitted). Stated differently, substantial evidence equates to
6 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
7 citation omitted). In determining whether the standard has been satisfied, a
8 reviewing court must consider the entire record as a whole rather than searching
9 for supporting evidence in isolation. *Id.*

10 In reviewing a denial of benefits, a district court may not substitute its
11 judgment for that of the Commissioner. "The court will uphold the ALJ's
12 conclusion when the evidence is susceptible to more than one rational
13 interpretation." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).
14 Further, a district court will not reverse an ALJ's decision on account of an error
15 that is harmless. *Id.* An error is harmless where it is "inconsequential to the
16 [ALJ's] ultimate nondisability determination." *Id.* (quotation and citation omitted).
17 The party appealing the ALJ's decision generally bears the burden of establishing
18 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

19 FIVE-STEP EVALUATION PROCESS

20 A claimant must satisfy two conditions to be considered "disabled" within
21 the meaning of the Social Security Act. First, the claimant must be "unable to

1 engage in any substantial gainful activity by reason of any medically determinable
2 physical or mental impairment which can be expected to result in death or which
3 has lasted or can be expected to last for a continuous period of not less than twelve
4 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
5 impairment must be “of such severity that he is not only unable to do his previous
6 work[,] but cannot, considering his age, education, and work experience, engage in
7 any other kind of substantial gainful work which exists in the national economy.”
8 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

9 The Commissioner has established a five-step sequential analysis to
10 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§
11 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
12 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
13 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
15 404.1520(b), 416.920(b).

16 If the claimant is not engaged in substantial gainful activity, the analysis
17 proceeds to step two. At this step, the Commissioner considers the severity of the
18 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
19 claimant suffers from “any impairment or combination of impairments which
20 significantly limits [her] physical or mental ability to do basic work activities,” the
21 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the

1 claimant's impairment does not satisfy this severity threshold, however, the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(c), 416.920(c).

4 At step three, the Commissioner compares the claimant's impairment to
5 severe impairments recognized by the Commissioner to be so severe as to preclude
6 a person from engaging in substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
8 severe than one of the enumerated impairments, the Commissioner must find the
9 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

10 If the severity of the claimant's impairment does not meet or exceed the
11 severity of the enumerated impairments, the Commissioner must pause to assess
12 the claimant's "residual functional capacity." Residual functional capacity
13 ("RFC"), defined generally as the claimant's ability to perform physical and
14 mental work activities on a sustained basis despite his or her limitations, 20 C.F.R.
15 §§ 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of
16 the analysis.

17 At step four, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing work that he or she has performed in
19 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
20 If the claimant is capable of performing past relevant work, the Commissioner
21 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).

1 If the claimant is incapable of performing such work, the analysis proceeds to step
2 five.

3 At step five, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing other work in the national economy.
5 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
6 the Commissioner must also consider vocational factors such as the claimant's age,
7 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
8 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
11 work, analysis concludes with a finding that the claimant is disabled and is
12 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

13 The claimant bears the burden of proof at steps one through four. *Tackett v.*
14 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
15 the burden shifts to the Commissioner to establish that (1) the claimant is capable
16 of performing other work; and (2) such work "exists in significant numbers in the
17 national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
18 700 F.3d 386, 389 (9th Cir. 2012).

19 THE ALJ'S FINDINGS

20 At step one, the ALJ found that Plaintiff has not engaged in substantial
21 gainful activity since February 18, 2015, the alleged onset date. Tr. 773. At step

1 two, the ALJ found that Plaintiff has the following severe impairments:
2 inflammatory bowel disease; polycystic ovarian syndrome; fibromyalgia; obesity;
3 and migraine headaches. Tr. 773. At step three, the ALJ found that Plaintiff does
4 not have an impairment or combination of impairments that meets or medically
5 equals the severity of a listed impairment. Tr. 774. The ALJ then found that
6 Plaintiff has the RFC to perform sedentary work as defined in 20 CFR §§
7 404.1567(a), 416.967(a) with the following limitations:

8 she can lift and carry 20 pounds occasionally, lift and carry 10 pounds
9 frequently, stand and/or walk 2 hours in an 8-hour workday with normal
10 breaks, and sit 6 hours in an 8-hour workday with normal breaks. She
11 can frequently balance and occasionally stoop, kneel, crouch, crawl, and
12 climb ramps or stair with no climbing of ladders, ropes, or scaffolds.
13 She must avoid even moderate exposure to hazards (e.g., working
14 around heights or moving dangerous machinery).

15 Tr. 775. At step four, the ALJ found that Plaintiff had no past relevant work. Tr.
16 781. At step five, the ALJ found that considering Plaintiff's age, education, work
17 experience, and RFC, there were other jobs that exist in significant numbers in the
18 national economy that Plaintiff could perform, including positions as a surveillance
19 systems monitor, an addresser, and a call out operator. Tr. 782. On that basis, the
20 ALJ concluded that Plaintiff was not under a disability, as defined in the Social
21 Security Act, from February 18, 2015, the alleged date of onset, through the date of
her decision. Tr. 782.

20 ISSUES

21 Plaintiff seeks judicial review of the Commissioner's final decision denying

1 her DIB under Title II of the Social Security Act and SSI benefits under Title XVI
2 of the Social Security Act. ECF No. 18. Plaintiff raises the following issues for
3 this Court's review:

4 1. Whether the ALJ met her burden at step five;
5 2. Whether the ALJ properly weighed the medical source opinions and lay
6 witness statements;
7 3. Whether the ALJ properly addressed Plaintiff's syncope; and
8 4. Whether the ALJ properly addressed Plaintiff's symptom statements.

9 DISCUSSION

10 1. The ALJ's Burden

11 Plaintiff argues that the ALJ failed to meet her burden at step five by failing
12 to prove that work "exists in significant numbers in the national economy" that
13 Plaintiff can perform. ECF No. 18 at 21.

14 Once a claimant establishes that she cannot perform her past relevant work,
15 it is the Commissioner's duty to establish that she can perform substantial gainful
16 employment that exists in significant numbers in the national economy. *Reddick v.*
17 *Chater*, 157 F.3d 715, 721 (9th Cir. 1998); 20 C.F.R. §§ 404.1566, 416.966. The
18 Ninth Circuit has declined to find that there is a bright-line rule when determining
19 the total number of jobs that is "significant." *Gutierrez v. Comm'r of Soc. Sec.*,
20 740 F.3d 519, 528-29 (9th Cir. 2014) (finding 25,000 national jobs significant). In
21 *Gutierrez*, the Ninth Circuit found that 25,000 jobs was a "close call." *Id.* at 529.

1 District courts in the Ninth Circuit have varied in their conclusions of what
2 constitutes “significant.” *Compare, e.g., Montalbo v. Colvin*, 231 F. Supp. 3d 846,
3 863 (D. Haw. 2017) (finding 12,300 national jobs significant) and *Evans v. Colvin*,
4 No. ED CV 13-01500, 2014 WL 3845046, at *2-3 (C.D. Cal. Aug. 4, 2014)
5 (finding 6,200 national jobs significant) with *Baker v. Comm'r of Soc. Sec.*, 2014
6 WL 3615497, at *8 (E.D. Cal. July 21, 2014) (finding 14,500 national jobs
7 insignificant) and *Valencia v. Astrue*, No. C 11-06223, 2013 WL 1209353 at *18
8 (N.D. Cal. Mar. 25, 2013) (finding 14,082 national jobs insignificant).

9 Specifically, this District has found that 8,500 national jobs, *Lora M. v. Comm'r. of*
10 *Soc. Sec.*, No. 2:18-cv-00198-MKD, 2019 WL 2130303, at *4 (E.D. Wash. April
11 5, 2019), and “15,000 to 16,000” national jobs, *Andrea L. v. Saul*, No. 2:15-cv-
12 00253-MKD, 2020 WL 888520, at *8 (E.D. Wash. Feb. 24, 2020), was insufficient
13 to carry the ALJ’s burden at step five.

14 Here, the ALJ identified the occupations that Plaintiff could perform based
15 on the RFC determination as surveillance systems monitor with 3,500 national
16 jobs, addresser with 3,000 national jobs, and call out operator with 3,000 national
17 jobs. Tr. 782. Therefore, the ALJ identified 9,500 national jobs available to
18 Plaintiff. This Court finds that 9,500 national jobs to be insufficient to carry the
19 ALJ’s burden.

20 Furthermore, Defendant conceded that the ALJ had improperly rejected the
21 opinion of Norman Staley, M.D., arguing that any error in doing so was harmless.

1 ECF No. 23 at 11-12. Dr. Staley had opined that Plaintiff was limited in reaching,
2 handling, and fingering bilaterally. Tr. 147. Defendant further conceded that such
3 limitation would preclude the position of addresser. ECF No. 23 at 12.
4 Eliminating this occupation would further limit the jobs available to Plaintiff to
5 just 6,500 national jobs. *Id.* at 14-15. This concession by Defendant further
6 affirms that the ALJ failed to carry her burden at step five.

7 Since the ALJ failed to establish that work exists in significant numbers in
8 the national economy at step five, the case is remanded for an immediate award of
9 benefits. The decision whether to remand for further proceedings or reverse and
10 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
11 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
12 where “no useful purpose would be served by further administrative proceedings,
13 or where the record has been thoroughly developed,” *Varney v. Sec'y of Health &*
14 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
15 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280
16 (9th Cir. 1990). This policy is based on the “need to expedite disability claims.”
17 *Varney*, 859 F.2d at 1401. Here, no useful purpose would be served if the case
18 were remanded for additional proceedings. The ALJ’s findings resulted in an
19 insignificant number of jobs available in the national economy. Considering this,
20 the Court need not address Plaintiff’s other challenges and remands the case for an
21 immediate award of benefits.

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 18, is **GRANTED**,

3 and the matter is **REMANDED** to the Commissioner an immediate

4 award of benefits.

5 2. Defendant's Motion for Summary Judgment, ECF No. 23, is **DENIED**.

6 The District Court Clerk is directed to enter this Order and provide copies to
7 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

8 **DATED** March 10, 2022.

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11 
12 LONNY R. SUKO
13 Senior United States District Judge